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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 905

Case No. 990: EL-FAR

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza; Mr. Chittharanjan Felix Amerasinghe;

Whereas, on 6 August 1997, Rawhi Abdulla El-Far, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 5 October 1997, the Applicant, after making the necessary corrections, again filed an application, requesting the Tribunal:

"[1.] [To] cancel the Commissioner-General's decision dated 1 June 1997 ...

[2.] To ... promote me from grade 8 to grade 10 retroactively [to] 13.3.1967.

[3.] To ... promote me to grade 11 [retroactively to] 1971.

[4.] To ... promote me to grade 12 since my appointment as a Senior Academic Instructor in 1983."

Whereas the Respondent filed his answer on 27 April 1998;

Whereas the Applicant filed written observations on 6 June 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Agency on 1 February 1958, on a temporary indefinite appointment as an area staff member in the capacity of Teacher IV, grade 4, at Jerusalem Boys School. He was promoted to grades 5, 6 and 7 on 1 November 1959, 1 September 1961, and 1 September 1964. With effect from 1 March 1967, he was promoted to grade 8, based on satisfactory completion of the two-year in-service teacher-training course. On 13 March 1967, he was transferred to the Vocational Training Centre, Wadi Seer as VT Instructor (Academic). On 1 April 1970, he was granted a service promotion to grade 9, and with effect from 1 September 1972, he was promoted to grade 10.

On 4 December 1990, the Field Education Officer, Jordan, wrote to the Director of Education, UNRWA Headquarters, Vienna, recommending that the Applicant be promoted to a higher grade in view of his academic and professional qualifications and as all qualified academic instructors at UNRWA's Training Centres had been promoted to grade 12. On 4 January 1991, the Acting Director of Education advised the Deputy Director of Personnel that he had examined the Applicant's case thoroughly and recommended that he be promoted to grade 11. He added:

> "Consideration may be given, in the future, for promoting him to grade 12, subject to a favourable decision of the Ministry of Higher Education, Jordan, on the equivalency of the P[Professional]/Courses to BA degree for licensing purposes ..."

On 7 March 1991, the Acting Director of Personnel wrote to the Director of Education, approving the Applicant's promotion to grade 11 on an equivalency basis, with effect from 1 March 1991.

On 2 May 1994, the Principal of the Wadi Seer Training Centre recommended to the Chief, Field Education Programme (C/FEP), that the Applicant be promoted to grade 12 because his qualifications "can be evaluated as equivalent to University level since they are exceeding four years of in-service training." On 8 May 1994, the C/FEP, Jordan, wrote to the Director of Education in Amman, recommending that the Applicant be promoted to grade 12 based on the Applicant's "wide experience in teaching English and the various professional in-service training courses", as well as his "loyalty, total commitment and full dedication to the profession." In turn, on 29 May 1994, the Director of Education in Amman wrote to the Director of Administration and Human Resources at Headquarters, Vienna, to the same effect.

On 13 June 1994, the Officer-in-Charge, Education Department, reported to the Chief, Personnel Services Division, that "no favourable decision was made on the equivalency of the Institute of Education courses, including the [professional courses], to BA degree for licensing purposes by the Ministry of Higher Education, Jordan." On 29 June 1994, the Chief, Personnel Services Division, notified the Director of Education that, in view of this information, the Applicant could not be promoted to grade 12, on an equivalency basis, and that the Applicant was not yet qualified for such promotion under the Occupation Classification Manual.

On 13 June 1996, the Principal of the Wadi Seer Training Centre again recommended to the C/FEP, that the Applicant be promoted to grade 12 in view of his long experience and other qualifications. On 1 August 1996, the C/FEP, wrote to the Officer-in-Charge, Administration Department, Jordan, supporting the recommendation of the Principal of the Wadi Seer Training Centre.

On 14 August 1996, the Field Personnel Officer (FPO) and Deputy Field Administration Officer (DFAO), Jordan, advised the C/FEP, that "there [was] no change in circumstances from the previous ruling from [Headquarters] in July 1994 that would necessitate re-raising the [Applicant's] case" to Headquarters.

On 20 September 1996, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the Agency's failure to promote him to grade 12.

On 10 October 1996, the Applicant wrote to the Deputy Director of UNRWA Affairs, Jordan, contesting the decision of 13 August 1996 not to raise the case again with Headquarters. On 22 October 1996, the Officer-in-Charge of UNRWA Operations informed the Applicant, "as you have already appealed to the Area Staff Joint Appeals Board, your case is left for recommendation by the Appeals Board, as the matter is now sub judice."

The JAB adopted its report on 2 April 1997. Its evaluation and recommendation read, in part, as follows:

"**III. EVALUATION ...**

...

(d) The Board noted that when the Appellant was promoted to grade 11, the requirements for Academic Instructors and Trade Instructors as set out in the Occupation Classification Manual [OCM] were not followed, and instead he was promoted to grade 11 on equivalency basis and that he has been working as an English Teacher since 1968 and as a Senior Academic Instructor since 1983.

Moreover, the Board is of the opinion that promoting the Appellant to the grade 11 without consideration for the OCM, constituted a precedent.

Furthermore, the Appellant worked for six years in grade 11, and in all he has served the Agency for 40 years.

In this context, the Board believes that since the Appellant has served the Agency for 40 years and since he was promoted to grade 11 without consideration for the requirements of the OCM therefore the Appellant deserves to be promoted to grade 12.

IV. RECOMMENDATION

17. In view of the foregoing and without prejudice to any further oral or written submission ..., the Board unanimously makes its recommendation that the Administration's decision appealed against be reviewed."

On 1 June 1997, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"... I have carefully reviewed the Board's report and noted its conclusions. Notwithstanding that you did not seek the review of the administrative decision prior to appealing, as required by the Rules, and that your appeal was manifestly out of time, the Board dealt only with the merits of the case. The Board noted that you had been promoted from grade 10 to grade 11 in 1991, which promotion, the Board believed, was not in accordance with the OCM. This, the Board opined, was a precedent to disregard the OCM's explicit requirements regarding the qualifications for your post. As a result, and taking into account your service with the Agency, the Board was of the opinion that you deserved to be promoted to grade 12 and therefore recommended that the administrative decision be reviewed accordingly.

I am unable to accept the Board's findings on the merits. The full grade of your post is grade 12. As you do not have the full qualifications for the post as set out in the OCM, you are not entitled to that grade. However, based on your qualifications, the Administration may award you a commensurate lower Grade. This occurred when you were promoted to grade 11 in 1991. Although you have no entitlement to the full grade of [t]his post, the Administration also [has] a discretion to award you that grade should it accept your qualifications as equivalent to the OCM requirement. It has not done so, and in the absence of a finding by the Board that this discretion was exercised improperly, I reject the conclusions of the Board on this issue. Furthermore, an appeal against an administrative decision is not receivable by the Board unless a staff member has first sought the review of the decision in accordance with the Rules. Unlike non-adherence to time limits, the Board cannot waive this mandatory procedural requirement. You did not seek the review of the administrative decision and on that ground too, I dismiss your appeal. Further, the Board did not explicitly address the issue of the lateness of the appeal, namely whether exceptional circumstances existed which justified the appeal, brought in 1996 against a decision made in 1994, being heard at all. Accordingly, I reject the Board's conclusions and recommendations and I must dismiss your appeal."

On 5 October 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's qualifications are equivalent to those required for promotion to the full grade of his post, and thus he is entitled to such a promotion, with retroactive effect to 1983.

2. The Applicant is entitled to retroactive effect of his prior promotions to grades 10 and 11.

3. The Applicant's appeal is receivable, as he properly sought review of a decision contained in a letter dated 14 August 1996. In that letter, the DFAO denied a request to raise the matter of the Applicant's promotion with Headquarters.

4. Exceptional circumstances justified accepting the Applicant's appeal.

Whereas the Respondent's principal contentions are:

1. The application is not receivable because the Applicant did not request administrative review of the contested decision prior to his appeal to the JAB.

2. The Applicant's appeal to the JAB was time-barred.

3. The Applicant's pleas seeking retroactive effect of his promotions to grades 10 and 11 are not receivable by the Tribunal, as he did not raise the issue before the JAB.

4. The Applicant is not entitled to a promotion to grade 12, and the Respondent properly exercised his discretion in this matter.

The Tribunal, having deliberated from 4 to 20 November 1998, now pronounces the following judgement:

I. The case arises from the failure of the Respondent to promote the Applicant to grade 12 post. The Respondent first proffers the arguments that the Applicant did not seek administrative review of the decision not to promote him before he took an appeal to the JAB and also that the appeal to the JAB was time-barred.

II. The JAB did not address these two issues, both of which had been raised by the Respondent. Instead, the JAB made a recommendation in the Applicant's favour, which was rejected by the Respondent.

III. In regard to the first issue, administrative review is a very important internal procedure. It gives the Administration an opportunity to redress a grievance before it is taken any further. As was stated by the League of Nations Tribunal, the tribunal of the predecessor organization to the UN, this procedure "seems to answer to a legal necessity inasmuch as while reconciling the interests of the officials with those of the Administration, it gives the latter an opportunity of verifying the facts alleged to be the cause of the damage to be made good." (Perrasse, League of Nations Administrative Tribunal, Judgement No. 14 (1935)). It is quite clear that the number of cases in which there are grievances and which are submitted for administrative review by the Secretary-General is greater than the number of those that reach the JAB or even the Tribunal. This proves the importance of administrative review in dissipating dissatisfaction and settling grievances. It is of the utmost importance that the Administration be given this opportunity, not only because it could result in avoidance of complicated and extended litigation but because it is only fair that the Administration be given the opportunity to reconsider and re-evaluate its decision before that decision is litigated. This is also the manner in which the process of settling grievances is generally structured in international administrative law. Administrative review under the UNRWA Area Staff Rules is not a mere embellishment or option. It is an integral part of internal procedures and the rules require that it be exhausted. The Staff

Rules make administrative review an obligatory internal procedure, and not an optional one nor one that can be waived, except by the Respondent.

IV. That having been said, the Tribunal finds, based on the particular facts in this case, that the JAB's decision to receive the appeal was justified. As explained below, the Respondent made certain representations to the Applicant that preclude the Respondent from maintaining that the Applicant failed to request administrative review.

On 1 August 1996, the Chief, Field Education Programme (C/FEP), wrote to the Officer-in-Charge, Administration Department, to present the Applicant's qualifications, which, in the C/FEP's view, made the Applicant eligible for promotion on an equivalency basis. This included an additional two years' teaching experience since the last request had been made to promote the Applicant on an equivalency basis. However, on 14 August 1996, the Field Personnel Officer (FPO) and the Deputy Field Administration Officer (DFAO) communicated to the C/FEP the decision that "there is no change in circumstances from the previous ruling from [Headquarters] in July 1994 that would necessitate re-raising the case of the [Applicant] to Headquarters."

On 20 September 1996, the Applicant lodged an appeal with the JAB against the decision not to recognize his qualifications for promotion to grade 12. Approximately three weeks *after* lodging his appeal, on 10 October 1996, the Applicant wrote to the Deputy Director of UNRWA Affairs, seeking administrative review. In that letter, the Applicant asserted that "[t]here is a certain change in my academic and professional qualifications that require reconsideration of my position accordingly" and asked that his case be raised with the Director of Education for reconsideration.

On the copy of the 10 October request for review included in the Applicant's official status file, the Deputy Director of UNRWA Affairs wrote two notes. The first note, written on 14 October 1996, instructs, "D/FAO + FPO[:] please handle with care -- this could lead to an appeal." The second note, written on 16 October 1996, confirms a

prior discussion with the DFAO and FPO as follows: "D/FAO + FPO[:] we discussed -- on the understanding he has already appealed to the ASJAB [Area Staff Joint Appeals Board], please reply that we must leave his case for recommendation by the appeals [sic], as the matter is now sub judice." Consequently, on 22 October 1996, the Officer-in-Charge, UNRWA Operations, informed the Applicant:

> "Now as you have already appealed to the Area Staff Joint Appeals Board, your case is left for recommendation by the Appeals Board, as the matter is now sub judice."

The Tribunal is of the view that the response to the Applicant's 10 October request for review exhibited a certain degree of bad faith. The Deputy Director of UNRWA Affairs responded in this manner after discussions with the very officer who had communicated the decision being appealed against. The Respondent should not have refused to conduct an administrative review when the Applicant sought such review. Rather, he should have advised the Applicant that his appeal before the JAB could not proceed until such review had been conducted. Had the Respondent so advised the Applicant, he would have had the opportunity to withdraw his appeal so that the review and appeals process could proceed in the proper order. More importantly, the Respondent might have had the opportunity to resolve this matter at that time, without the need for an appeals process. The 22 October letter suggests that the Respondent was waiving his right to conduct an administrative review and that he would, instead, leave the matter for the JAB to make a recommendation. The Tribunal finds that the Respondent is estopped from arguing that the appeal was not receivable based on the Applicant's purported failure to seek administrative review.

V. The Respondent argues that the claim was time-barred because the Applicant waited until 1996 to appeal a July 1994 decision not to promote him to grade 12. The

Respondent claims that the decision communicated to the C/FEP in the 14 August 1996 memorandum merely served to confirm the July 1994 decision. The Tribunal finds that the requests for promotion that the Applicant's supervisors presented to the Respondent in 1996 differed from those presented in 1994, in that the Applicant had two additional years of experience that might have warranted a reconsideration of the 1994 decision. Therefore, the decision against which the Applicant lodged an appeal is properly considered to be the one dated 14 August 1996. The area staff rules require a staff member to seek review of an administrative decision within one month of the contested decision. The Applicant thus might be considered to have acted either a few days late, if the 20 September 1996 initiation of an appeal provides the critical date, or 3-1/2 weeks late, if the 10 October 1996 request for review provides such date. However, since the FPO and DFAO appear not to have apprised the Applicant directly of the decision that had been made, but rather addressed the 14 August memorandum only to the C/FEP, the Tribunal finds that exceptional circumstances justified the Applicant's short delay in pursuing internal remedies to challenge that decision and warranted the JAB's waiver of the time-limit with respect to his seeking administrative review.

VI. As the application is receivable, the Tribunal must now examine the merits of the case. The relevant facts are as follows:

In 1994, the Applicant was recommended for promotion to grade 12. On 29 June 1994, the Chief, Personnel Services Division, notified the Applicant's department that the Applicant could not be promoted to grade 12 "on equivalency basis" and that under the Occupation Classification Manual he was not yet qualified for such a promotion. The decision was taken on the basis of a report from the Applicant's department that "no favourable decision was made on the equivalency of the Institute of Education courses, including the [professional courses], to BA degree for licensing purposes by the Ministry of Higher Education, Jordan." The Applicant's department had advised earlier that promotion

was subject to a favourable decision of the Ministry of Higher Education, Jordan, on the equivalency of the professional courses to a BA degree for licensing purposes.

On 13 June 1996, the Principal of the Wadi Seer Training Centre again recommended that the Applicant be promoted to grade 12. The C/FEP supported that recommendation. On 14 August 1996, the DFAO, Jordan, advised the C/FEP, that "there [was] no change in circumstances from the previous ruling from [Headquarters] in July 1994 that would necessitate re-raising the [Applicant's] case" to Headquarters.

VII. As the Tribunal has held, a staff member has no right to promotion in the absence of a specific legal obligation creating a corresponding right to promotion (cf. Judgement No. 275, Vassiliou (1981)). The administrative authority has a discretion in regard to promotion (cf. Judgements No. 275, Vassiliou, No. 375, Elle (1986) and No. 390, Walter (1987)). However, this discretion is not an absolute one and must be exercised without abuse so that the staff member is accorded fair treatment. The Tribunal has taken the view that failure to take relevant facts into consideration in the promotion process can amount to an irregularity for which compensation is due. (Cf. Judgements No. 312, Roberts (1983), No. 314, Tomiak (1983)).

VIII. The issue raised is whether the decision not to reconsider the Applicant for promotion in 1996, after he had been refused promotion in 1994, was properly taken.

The Tribunal notes particularly that the Applicant had two years more experience between 1994 and 1996 and that both of his supervisors had recommended promotion in view of his long experience and other qualifications. As a result, in the Tribunal's view, the decision not to promote the Applicant in 1994 was open to reassessment in 1996. The decision taken in 1996 not to raise his case with Headquarters for reconsideration for promotion was in error because it failed to take into account facts that had become relevant after the decision taken in 1994 not to promote him. The Tribunal concludes that, as a

result of this substantive error, the Applicant was denied fair and equitable treatment in regard to his request for promotion to grade 12, even though there was no certainty that he would have been promoted. For this irregularity, the Applicant must be compensated. The Tribunal also recommends that the Applicant be considered for promotion to the grade 12 level, as soon as possible.

IX. For the above reasons, the Tribunal:

(i) Decides that the application is receivable;

(ii) Orders the Respondent to pay to the Applicant compensation in an amount equivalent to three months net base salary at the rate in effect on the date of this judgement; and

(iii) Rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Member

Chittharanjan Felix AMERASINGHE
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary